IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 31 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HASAN ABDE REHMAN - Appellant(s)
Versus
ABA MAMAD & 2 - Defendant(s)

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Appearance :

MR PM THAKKAR for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1 - 2.
MR DEEPAK M SHAH for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 15/01/2007

ORAL JUDGMENT

Original claimant has approached this Court under section 110-D of the Motor Vehicles Act, 1939 [hereinafter referred to as 'the Act'] to seek

enhancement of the compensation granted by the Claims Tribunal [Main] Junagadh, by judgment and award dated 29/3/1985 made in M.A.C. Petition No. 413/1983. The appellant had filed the aforesaid M.A.C. Petition for claiming compensation of Rs.80,000/- for the injuries received by him in a vehicular accident. The accident in question took place on 18/6/1983 sometime between 8.15 and 8.30 a.m. He was travelling in a public carrier bearing registration No. GTB 5187 as a Cleaner. When the vehicle reached near Kamnath Oil Mill on the Highway leading to Junagadh, another vehicle bearing registration no. GTX 5626 of the ownership of respondent no. 2, approached the spot from opposite direction. According to the appellant, it was being driven at an excessive speed and in a rash and negligent manner. As a result of it, the tanker collided with the truck in which the appellant was travelling. He received serious injuries. He was initially treated in Veraval Hospital, but thereafter he was shifted to Dr. Mori's Hospital for further treatment. He had sustained fractures of left leg and left hand and also injuries on other parts of the body. According to the appellant, he was working as Cleaner and was attached to the truck bearing no. GTB 5187 and he was drawing monthly salary of Rs.550/- plus D A of Rs.10/- whenever he was required to travel with the truck. According to him, due to the injuries suffered, he had to incur substantial expenditure for medical treatment as also towards sundry items. He filed the aforesaid claim petition for seeking compensation of Rs.80,000/-.

2. The claim was resisted by the respondent no. 2 by filing written statement at Exh. 10. He admitted the accident but denied that the tanker was driven in a rash and negligent manner by the respondent no. 1. He further averred that it was driver of the truck who was responsible for accident. All the other averments made in the petition were also denied by respondent no. 2. So far as the respondent no. 1 is concerned, he filed written statement at Exh. 17, which was on the same line. Respondent no. 3 filed written statement at Exh. 16. According to it, driver of truck who was equally negligent for causing the accident.

2.1. Before the Claims Tribunal, oral as well as documentary evidence was led. On the basis of the material produced before it, the Claims Tribunal found respondent no. 1 negligent to the extent of 50% and held respondent no. 2 vicariously liable to that extent. The Claims Tribunal further assessed the compensation at Rs.26,166=10 paise, but according to it, since the appellant had not joined the driver, owner and the insurance company of the truck in which he was travelling, the Tribunal awarded only Rs.13,083=05 paise, being the 50% amount of the total assessment of the compensation. Hence, this appeal.

3. I have heard Ms. Sangeeta N Pahwa, learned advocate appearing for the appellant and Mr. DM Shah, learned advocate appearing for respondent

no. 3. Respondents no. 1 and 2 are served but no-one appears. It is contended by Ms. Pahwa that the Claims Tribunal has wrongly deducted 50% from the total amount of compensation since, the law is that claimant could sue the tort feasors either jointly or severally. She has placed reliance on decision rendered by the Division Bench of this Court in the case of Hiraben Bhaga v. Gujarat State Road Transport Corporation reported in AIR 1981 Gujarat at page 267.

3.1. As against that, Mr. Shah has contended that when the driver, insured and the insurance company of the truck in which the appellant was travelling, have not been joined as party to the proceedings, the insurance company of the tanker cannot be made to satisfy the entire award. He has supported the judgment of the Claims Tribunal.

4. I have carefully considered the aforesaid submissions of learned advocates and I have also perused the record and proceedings of the case. So far as the factum of accident is concerned, it is undisputed. So far as the amount of compensation determined by the Claims Tribunal is concerned, there also no dispute has been raised in this appeal by the respondents. The only controversy that can be spelt out is that whether Claims Tribunal was empowered to direct respondent no. 3 to initially satisfy the entire award and then recover the same from the other insurance company.

4.1. In view of the aforesaid limited controversy, I do not propose to deal with and discuss the aspects regarding the negligence and the assessment of just compensation. In this appeal, the appellant has even not sought enhancement of the compensation awarded to him by the Claims Tribunal.

4.2. So far as the decision referred to above in the case of Hiraben Bhaga [supra] is concerned, it clearly lays down that :

> "where as a result of collision between jeep and S.T. Bus death of one of the occupants occurred and in a claim petition filed by the heirs of the deceased only S.T. Corporation and bus driver were made opponents. It is held that although the claimants had the option to join the driver of a jeep as one of the opponents for his contributory negligence, that choice given to the claimants did not make him a necessary party. The claimants could sue the joint tort-feasors either jointly or severally and could have a complete redress for the injuries suffered by them from either of them. An application therefore was tenable."

It has further observed in para. 10 as under :-

> "10. The second error which the Tribunal committed is of deducting 50 per cent for the contributory negligence of the jeep driver which he assessed at 50 per cent, that is to say to an equal extent. It passes one's understanding as to how could a passenger's compensation be deducted on account of the contributory negligence of the driver of a vehicle. It is entirely the choice of the claimants whether to implead both the joint tort-feasors or either of them. The claimants cannot be saddled with the liability for contributory negligence of one of the joint tort-feasors, if

> they fail to implead him as one of the opponents in their claim petition. It would be for the impleaded joint tort-feasor to take proceedings to get the other joint tort-feasor impleaded in the claim petition, or for that matter such an impleaded joint tort-feasor may select to sue the other one after the decree or award is given and the other joint tort-feasor is held liable therein. It would be however quite a different argument to advance that because the claimants did not join one of the tort-feasors, they themselves should be held liable for the deduction of the amount, which the omitted joint tort-feasor would have been called upon to pay. Thus, there would be no deduction in the amount of compensation awarded to the appellants as done by the Tribunal."

It is, therefore, clear that it is solely the choice of the appellant i.e., original claimant whom to join as party. In the instant case, the appellant has joined only driver, owner and insurance company of the tanker. Claims Tribunal found that both the drivers of the vehicles involved in collision were rash and negligent to equal extent i.e., 50%. In fitness of things the appellant ought to have joined them but merely because they are not joined as parties to the proceedings, the appellant would not suffer any setback. When there are more than one tort-feasor, the liability is joint and several and the tort-feasor cannot insist that the claimant should join the other tort-feasor as party though it may be open for the one tort-feasor to file an application requesting the concerned forum to implead other tort-feasor as party. In the instant case that is not done. Reasons given by the Tribunal are contained in para. 20 wherein it has been observed that the appellant for reasons known to him had elected only

the driver, owner and insurer of the truck involved in the accident. They were, therefore, jointly and severally liable to satisfy the claim of the appellant. The aforesaid decision of the Division Bench has, however, made it very clear that the choice is that of the claimant whether to implead one or all the tort-feasor, but that cannot come in the way of the claimant to recover the amount of compensation. In the instant case the appellant has chosen to implead only the present 3 respondents who were connected with the offending truck as opponents to the proceedings. But the Tribunal on that count cannot slash down the amount to half, especially when it appears that no such contention was raised before the Tribunal. But so far as the truck is concerned, the position is that appellant was the employee of the owner and the truck was being driven at the relevant time for the owner's work and it can safely be said that he sustained injuries in the course of his employment. Therefore, the liability would only be to the extent of Workmen's Compensation Act so far as the insurance company of the truck is concerned. This is in view of the decision rendered in the case of National Insurance Co. Ltd. V/s. Prembai Patel reported in (2005) 6 S.C.C. At page 172 and not beyond that. In view of the same, the appeal is partly allowed with no order as to costs.

[Akshay H Mehta, J.]

* Pansala.